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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SUMMIT CARBON SOLUTIONS, LLC, Petitioner, v. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA, Respondent, And SIERRA CLUB IOWA CHAPTER and OFFICE OF CONSUMER ADVOCATE, Intervenors.	Case No. CVCV062900 **POST-HEARING BRIEF OF SUMMIT CARBON SOLUTIONS, LLC**

On December 14, 2021, Summit Carbon Solutions LLC ("Summit Carbon") filed this action seeking a temporary and permanent injunction against the Iowa Utilities Board ("Board") enjoining the release of certain mailing lists that were voluntarily provided by Summit Carbon on informal request from Board staff. These lists, which show where notice of a required informational meeting regarding Summit Carbon's carbon dioxide pipeline project were mailed, were requested from the Board by Sierra Club Iowa Chapter ("Sierra Club") under Iowa Code chapter 22, the Iowa Open Records Act ("Act").

Summit Carbon argued that, among other reasons, the disclosure should be enjoined as it was covered by an exception to the Act, Iowa Code §22.7(18). That exception provides, in relevant part:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:
>
> . . .
>
> 18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists. Notwithstanding this provision:
>
> a. The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.
>
> b. Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity of the person outside of government making it or enabling others to ascertain the identity of that person.

On February 11, 2022, the Court ruled on the temporary injunction, granting that relief and enjoining disclosure. In that Order, however, the Court, for purposes of the permanent injunction, focused on the issue of whether Summit Carbon's provision of the list to the Board was voluntary or whether it was "required by law, rule, procedure, or contract" for purposes of §22.7(18), and set the framework for the final decision in this matter:

> The Court finds that, given Summit's request to treat the information as confidential, and the fact that other similar companies did not voluntarily submit the information, the Board could reasonably believe that such communications would not be voluntarily provided if they would become "available for general public examination." Thus, the primary issue before the Court is assessing whether the communication was "not required by law, rule, procedure, or contract." . . . .
>
> [I]t appears undisputed that the lists were not required by law, rule, or contract, but there is a factual dispute as to whether they were required by "procedure."

> Summit bears the burden of proving that § 22.7(18) applies, but the Court recognizes the difficulty of proving a negative—the absence of a procedure.

Temporary Injunction Order at 4. The evidence now in the record makes abundantly clear that the "communications" in this case were not required at the time they were made – including by any "procedure" if that term is to have any meaning.

The Court has already, correctly, found it undisputed that no statute, rule or contract required Summit Carbon to communicate its informational mailing lists to the Board. The question, then, is whether the Board had a "procedure" that "required" the communication. But Iowa Code §22.7 does not provide a definition of the term "procedure" in this context. So the first step is to determine what "procedure" means. There are two principles that should guide the Court in evaluating whether the Board had a "procedure" as that term is used in §22.7(18).

First is the purpose of the exception in §22.7(18). Unlike the other exception to the Act, this exception is not to be read in a manner that restricts confidentiality. As this Court noted in the Temporary Injunction Order at 5, in *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 898 (Iowa 1988), the Iowa Supreme Court concluded that "It is the legislative goal to permit public agencies to keep confidential a ***broad*** category of useful incoming communications which might not be forthcoming if subject to public disclosure."

Second are the maxims of statutory construction regarding terms used together and the impact of what is included or excluded from lists of terms:

> Guidance is provided by a canon of construction, *noscitur a sociis*, which "summarizes the rule of both language and law that the meanings of particular words may be indicated or controlled by associated words." 11 Richard A. Lord, *Williston on Contracts* § 32:6, at 432 (4th ed.1999) [hereinafter *Williston*]; *see also Fleur de Lis Motor Inns, Inc. v. Bair*, 301 N.W.2d 685, 690 (Iowa 1981) ("`The rule of *noscitur a sociis* and the rule of *ejusdem generis* produce identical results in most situations.'" (quoting 2A Sutherland, *Statutes & Statutory Construction* §§ 47.16, 47.17 (4th ed.1973))). "`The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often

> wisely applied where a word is capable of many meanings.'" *Williston*, § 32:6, at 433-34 (quoting *Jarecki v. G.D. Searle & Co*., 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859, 863 (1961)).

Peak v. Adams, 799 NW 2d 535, 547-548 (Iowa 2011). The U.S. Supreme Court illustrated this concept well in finding specific terms in a list have a restrictive effect on broader terms later in that list:

> This reading of § 1, however, runs into an immediate and, in our view, insurmountable textual obstacle. Unlike the "involving commerce" language in § 2, the words "any other class of workers engaged in ... commerce" constitute a residual phrase, following, in the same sentence, explicit reference to "seamen" and "railroad employees." Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases "seamen" and "railroad employees" if those same classes of workers were subsumed within the meaning of the "engaged in ... commerce" residual clause. The wording of § 1 calls for the application of the maxim ejusdem generis, the statutory canon that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991); *see also Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991). Under this rule of construction the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it; the interpretation of the clause pressed by respondent fails to produce these results.

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001). This analysis is entirely on-point with the proper analysis of the language in Iowa Code §22.7(18) – the breadth of the term "procedure" must "be controlled and defined by reference to the enumerated categories. . . which are recited just before it."

Statutes, rules and contracts are all require certain formalities to be valid, and require certain rigor in their parameters being knowable. It would make no sense to use "procedure" in the context of those three words unless there were similar expectations on what qualified as a

"procedure." If literally anything the Board asks for is a "procedure" that "requires" compliance, that term is both out of character with the "company it keeps," but also substantially undermines the other terms to the point of rendering them superfluous – who needs a rule or statute if literally anything can be a required procedure? The legislature could merely have said "procedure" and had the same resulting coverage. Such a reading, however, defeats the effort to create a broad confidentiality to encourage sharing of useful information from private parties to the government.

If, however, there are even the slightest requirements for a procedure to have some discernable structure, consistency, and force it is abundantly clear that no *procedure* was in place that *required* Summit Carbon to communicate its informational meeting mailing lists. While there has been some dispute over the Board's representations and what they mean, the best evidence remains what the Board actually ***did***. No one has contested the veracity or accuracy of the actual list of linear infrastructure dockets provided by the Board in response to discovery in this case. And the list provided to Summit Carbon tells a compelling story in several parts:

1) Prior to August 2021 when Summit Carbon provided its mailing lists (p. APP 8, row 65) there had ***never*** been a pipeline project (a P-docket or HLP-docket), ever, where such a list was requested – the entry for HLP-2014-0001 (Dakota Access, APP 6, row 2) was a list of where the finished, operating pipeline was actually located, provided years after the controversy of the permitting hearing.[1]

2) The Board had suggested earlier in the process that there was a change of policy in June 2019. The facts, however, do not support that: APP 7, row 7 and 8 show

[1] Huser Tr. 20:24-21:18.

electric transmission dockets immediately thereafter in July 2019 where the list was ***not*** requested.

3) At best the requesting of such lists was far too random and sporadic to reflect a "procedure" – from June 2019 through the end of that year, there were 7 electric transmission dockets; in 3 – less than half -- the list was requested and in 4 it was not; in all of 2020, after the alleged policy change, there were 8 relevant dockets; the list was requested in 3 and ***not*** requested in 5. After a string of requests in 2021, beginning in November 2021 the Board once again ***stopped*** requesting the lists, and in January 2022 made ***but then withdrew*** a request.

There simply was no pattern to suggest a coherent "procedure" involving requests – much less any requirement – for such lists.

This lack of any discernable structure and lack of any actual requirement suggested by the list was confirmed by the sworn testimony of Board Chair Geri Huser. The Chair made clear that there is no set procedure – that the question of whether to even ask for an informational mailing list is entirely a case-by-case decision (Huser Tr. 17:7-9) – an alleged "procedure" that even now is in flux ("We're adjusting it.", Huser Tr. 7:2). As Chair Huser clarified,

- The "routine practice" has never been for all informational meeting requests (Huser Tr. 7:15-20);
- It has not been included in all cases (Huser Tr. 8:9-12);
- It is only "done some of the time." (Huser Tr. 9:21-25; and
- There is no fixed procedure "[b]ecause all dockets are different." (Huser Tr. 12:10-12) and "nothing is routine as it relates to any hazardous liquid pipelines." (Huser Tr. 10:5-6).

Just as important as there being nothing that can fairly be described as a "procedure," there is also nothing about the kind of informal request made to Summit Carbon in August 2021

that is a "requirement" for purposes of Iowa Code §22.7(18). As Chair Huser made very clear, when the Board *requires* something, it speaks through its orders:

> Q. Well, what would happen if an applicant refused to provide the information?
>
> A. It depends on what context the request was made. If it's informal and part of a planning meeting versus in an order, they have different meanings.
>
> Q. They have different what?
>
> A. It means something differently. I can ask for something, an order directs that it be done.

Huser Tr. 10:16-23. *See also* Huser Tr. 13: 12-14 ("The easy answer is, the Iowa Utilities Board follows the statute, follows our rules. And if there are no written procedures, we speak through our orders.")

Chair Huser recounted informal requests, like the one made of Summit Carbon in this case, are not always complied with. *See* Huser Tr. 22:17 (". . . in my experience, we don't always get the list."); 10:11-13 ("I do believe that an applicant has declined to provide us with that information.") In a case directly on point, a similar carbon capture pipeline in a different IUB docket, sponsored by Navigator CO2, did not provide a mailing list prior to the start of their information meetings, but the informational meetings were allowed to continue, and nothing was done to enforce the informal request.

> Q: . . . Had the Navigator informational meetings started already, prior to the December 16th order?
>
> A. I believe they had.
>
> Q. And they had not provided the board with a list similar to the one Summit had provided, prior to the start of those informational meetings; correct?
>
> A. They had not.

Q. And they were allowed to go forward with those informational meetings; correct?

A. They were.

Q. Was there any penalty to Navigator for not providing those prior to the informational meeting?

A. No.

Huser Tr. 22:12-24.

The evidence overwhelmingly demonstrates that the information Summit Carbon communicated to the Board in August 2021 was not, at the time it was communicated, "required" by any discernable "procedure."

CONCLUSION

At the pre-planning meeting for the county informational meetings for the Summit Carbon project, a member of the Iowa Utilities Board staff made an informal request for Summit Carbon's mailing list for notices of the meetings. The lists would be "useful incoming communications which might not be forthcoming if subject to public disclosure." *City of Sioux City*, 421 N.W.2d at 898. And in fact, in some cases such requests have not been complied with. The fact that Summit Carbon voluntarily complied, however, is consistent with the information being protected by the open records exception in Iowa Code §22.7(18) – the information communicated was not "required by law, rule, procedure, or contract." It is undisputed that the information was not required by law, rule or contract. But the evidence shows that there also is no discernable, definable "procedure" as that term is used in context. And even if there is, compliance with the procedure is not "required" – companies have declined to provide informally-requested lists without consequence, including a project nearly identical to Summit

Carbon. Because of these facts and this history, Summit Carbon and the Board both anticipated the list would be protected from disclosure when it was provided. *See* Huser Tr. 14:8-13.

The Court correctly applied the temporary injunction factors to prevent disclosure of the lists in this case. At that time, the Court found the remaining issue for a permanent injunction was whether Summit Carbon could show there was no "procedure" that "required" provision of the information. The Court granted that proving a negative – the absence of a procedure – is a dilemma to be noted in considering Summit Carbon's proof. Nonetheless, Summit Carbon believes it has succeeded: the evidence is overwhelming that no binding procedure existed. As a result, the exception in §22.7(18) apples, and a permanent injunction should now be issued.

Filed this 5th day of August, 2022.

Respectfully submitted,

/s/ Bret A. Dublinske

Bret A. Dublinske
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Telephone: (515) 242.8904
E-mail: bdublinske@fredlaw.com

ATTORNEYS FOR
SUMMIT CARBON SOLUTIONS

CERTIFICATE OF SERVICE

The undersigned certifies that on August 5, 2022, the foregoing document was electronically filed with the Clerk of Court using the EDMS system which will send a notice of electronic filing to all counsel of record registered with the EDMS system.

/s/ Olivia Lucas